93-547

Supreme Court, U.S.
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No. 93-_____

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

FRONTIER PILOTS LITIGATION
STEERING COMMITTEE,
Plaintiffs-Appellants

v.

TEXAS AIR CORPORATION,
CONTINENTAL AIRLINES, INC.
PEOPLE EXPRESS, INC., JOHN ADAMS
and JOHN DOES 1 through 10,
Defendants-Appellees.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is proper for the District Court, applying Colorado law, to summarily dismiss an uncertified class action lawsuit without taking into consideration and applying controlling Colorado precedent which negates summary disposition.

2. Whether it is proper for the District Court to summarily dismiss an uncertified class action lawsuit under F.R.C.P. 56 when discovery on the Rule 56 issues remains outstanding and unanswered by the moving party in defiance of existing Court orders authorizing discovery.

3. Whether it is proper for the District Court to invoke the doctrines of *res judicata* and *collateral estoppel* to summarily dismiss an uncertified class action lawsuit when the cause of action in the pending case has never been actually litigated or decided and was not ripe for adjudication in the prior proceedings.

4. Whether it is proper for a District Court in an uncertified class action lawsuit to summarily adjudicate disputed issues of personal knowledge of a few members of the class and apply those contested findings to the entire class so as to invoke summary disposition.

5. Whether the members of an uncertified class action lawsuit seeking damages in excess of $500 million have been deprived of fundamental due process rights by a summary dismissal under Rule 56, without benefit of discovery, which applies the doctrines of *res judicata* and *collateral estoppel* to a cause of action which the Plaintiff class never knew existed prior to the initiation of the proceedings below.

PARTIES TO THE PROCEEDING

The Plaintiff is the Frontier Pilots Litigation Steering Committee, a committee of former Frontier Pilots incorporated under the laws of the State of Colorado and composed of individuals who are either currently employed by Continental Airlines as a result of job offers they accepted from Continental Airlines in the fall of 1986 or who were initially employed by Continental Airlines in 1986 but thereafter ceased such employment, or who signed a Job Preservation and Litigation Settlement Agreement ("JPA"). All members of the class are pilots formerly employed by Frontier Airlines, Inc.

The Defendants are Texas Air Corporation, Continental Airlines, Inc., People Express, Inc., John Adams, and John Does 1 through 10.

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OPINIONS BELOW

The Letter Opinion and Order of the United States District Court for the District of New Jersey entered on September 25, 1992 is reprinted in the Appendix at pages A1-A37.

The Judgment Order of the United States Court of Appeals for the Third Circuit on appeal from the United States District Court for the District of New Jersey entered June 10, 1993 is reprinted in the Appendix at pages B1-B2.

The Judgment Order of the United States Court of Appeals for the Third Circuit on Petition for Rehearing En Banc entered July 8, 1993 is reprinted in the Appendix at pages C1-C2.

JURISDICTION

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1). The Judgment Order of the Court of Appeals was entered on July 8, 1993.

STATEMENT OF THE CASE

From late 1985 through most of 1986, Frontier Airlines was a wholly owned subsidiary of People Express, Inc. ("PEI"). On August 28, 1986, PEI caused Frontier to file for bankruptcy in the United States Bankruptcy Court for the District of Colorado seeking reorganization pursuant to Chapter 11 of the Federal Bankruptcy Code.

Shortly thereafter, Texas Air Corporation ("TAC"), lead by Frank Lorenzo, made public negotiations to acquire all of Frontier's outstanding stock and assets and to reemploy Frontier's employees at Continental Airlines, a wholly owned subsidiary of TAC. Lorenzo's representatives conducted negotiations with Frontier's pilots, the Plaintiff class in this case, between September 15, 1986 and October 1, 1986.

As part of those negotiations, Lorenzo's representatives prepared a document entitled Job Preservation and Litigation Settlement Agreement ("JPA"). The purpose of the JPA was ostensibly to integrate the Frontier pilots into Continental through a seniority arbitration. However, the JPA contained numerous preconditions to that process, including requirements that the arbitration be biased against the Frontier pilots and that the class waive millions of dollars in bankruptcy claims which they held against PEI (which TAC was acquiring as part of the transaction) and others, including Continental and Frontier. The JPA was ultimately executed in October of 1986 and a seniority arbitration based on its terms (the "Nicholau arbitration") occurred the following year. It was through this process that the class of Plaintiffs in this action were integrated into Continental Airlines and suffered over $500 million in damages as described

in Proofs of Claim filed in the Continental bankruptcy proceedings in 1991 by the Plaintiff class herein.

In April of 1989, almost two years after the Nicholau arbitration was concluded, and in connection with an action brought against Continental by the People Express pilots, Continental's representatives admitted the existence of *another* arbitration and seniority agre ment entitled Labor Protection Agreement ("LPA").[1] The purpose of the LPA, which had been drafted prior to Continental's negotiations with the Frontier pilots, was also to provide for seniority integration procedures into Continental Airlines. However, unlike the JPA, the LPA contained *no* preconditions to the arbitration and required *no* waiver of claims, and was, over-all, a far superior arbitration and integration agreement for the Plaintiff class.

The LPA was neither adequately disclosed nor explained to the Frontier pilots during their negotiations and, in fact, was described by Lorenzo's representatives as a "non-existent" and "meaningless" document having no affect on the Frontier pilots' employment prospects. These representations were false, and were intended to induce the Plaintiff class into signing the JPA in lieu of the LPA.

When Continental's representatives later admitted in April of 1989 in the PEX case that the LPA *did* exist and *was* intended to govern seniority integration into Continental Airlines, and having been deprived of its salutary benefits during the Septem-

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[1] The case of *PEX Pilots Merger Committee v. Texas Air Corporation, et al.* Civil Action No. 87-1155, United States District Court for the District of New Jersey (the "*PEX*" case) was filed by former pilots of People Express Airlines seeking to compel arbitration and integration into Continental under the terms of the LPA. It was in conjunction with this action that Continental ultimately admitted in April of 1989 that the LPA was a binding agreement intended to govern employment and integration procedures through which employees of PEI and its subsidiaries (including the Plaintiff class) would become pilots at Continental.

ber 1986 negotiations, all former Frontier pilots affected by the concealment and non-disclosure of the LPA filed suit on September 19, 1989 in the United States District Court for the District of New Jersey (the case below) alleging claims of fraudulent inducement, misrepresentation, and tortious interference with contract. The case below was brought as a class action, but was dismissed before formal class certification could be obtained.

In late 1990, while the case below was pending and Court-ordered discovery remained outstanding, the corporate Defendants herein filed for Bankruptcy protection, and the case below was stayed. On October 2, 1991, pursuant to an evidentiary hearing on the merits, the United States Bankruptcy Court for the District of Delaware lifted the automatic stay "for cause" under 11 U.S.C. § 362(d)(1) and ordered the Plaintiff class' damages case and limited discovery to proceed before the District Court.[2]

Refusing to allow any discovery whatsoever, and imputing knowledge of the LPA to the Plaintiff class, which the class disputed, the District Court summarily dismissed the Plaintiffs' class action lawsuit under F.R.C.P. 56 on *res judicata* and *collateral estoppel* grounds. The District Court ruled that the Frontier pilots should have raised an LPA - based fraud claim in conjunction with the Nicholau arbitration and Frontier bankruptcy proceedings which pre-dated the April 1989 disclosures. The District Court's dismissal was upheld without explanation by the United States Court of Appeals for the Third Circuit.

Basis for Federal Jurisdiction Below

The District Court's jurisdiction was based on 28 U.S.C. § 1332.

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[2] One of the findings which the Bankruptcy Court was required to make in lifting the Automatic Stay "for cause" was a "probability of prevailing on the merits." *See e.g., In re Parkinson*, 102 B.R. 141, 142 (C.D. Ill. 1988).

SUMMARY OF ARGUMENT

The crucial issue before this Court is whether it was proper for the District Court to summarily dismiss the Plaintiff's class action lawsuit, before the class was even certified, and thereby deprive the Plaintiff class of their day in Court, on the basis of a *res judicata/collateral estoppel* argument that the Plaintiff class should have litigated an LPA-based fraud claim in arbitration and bankruptcy proceedings which pre-dated the disclosures which gave rise to the claims below.

The District Court's *res judicata/collateral estoppel* ruling was predicated on its finding that the Plaintiff class (as yet uncertified) had "sufficient knowledge" about the facts to raise an LPA-based fraud claim in the Nicholau arbitration and Frontier bankruptcy proceedings which *preceded* the LPA disclosures in 1989. Affidavits were introduced into evidence before the District Court by members of the Plaintiff class stating that they had no basis to believe that an LPA-based fraud claim even existed until April of 1989 when Continental admitted, for the first time, both the existence and the intended affect of the LPA. Affidavits of counsel who represented the Frontier pilots in the Nicolau arbitration proceedings conducted pursuant to the JPA were introduced stating that no LPA fraud cause of action existed or could have been legitimately pursued in conjunction with those arbitration proceedings.

Controlling precedent under Colorado law, which the District Court was obliged to follow,[3] was introduced which required the Defendants to make a full and complete disclosure of all material information affecting the Plaintiffs' employment prospects during the September 1986 negotiations, and evidence was introduced that the Defendants had concealed, and then later misrepresented, both the existence and the intended affect of the LPA from September of 1986 through April of

[3] The District Court stated that "Colorado law governs this case," App. at p. A-20, but failed to apply that law to the issues. *See infra* at Section I.

1989. Finally, evidence was introduced that the LPA-based fraud claim at issue in these proceedings had never been actually litigated or decided in either the Nicholau arbitration or the Frontier bankruptcy proceedings, thereby rendering the doctrines of *res judicata* and *collateral estoppel* inapplicable as a matter of law.

ARGUMENT

In entering summary judgment in favor of the Defendants, the District Court: (1) completely disregarded controlling Colorado precedent which precluded the basis for summary judgment; (2) deprived the Plaintiff class of any discovery whatsoever on the very issues on which the Defendants were seeking summary judgment; and (3) imputed personal knowledge to members of the Plaintiff class - hotly disputed by those same individuals - to enable the District Court to conclude that the Plaintiff class knew or should have known of the basis for an LPA-based fraud claim long before either the LPA or its intended affect were truthfully disclosed by the Defendants.

I. THE DISTRICT COURT DENIED THE PLAINTIFF CLASS FUNDAMENTAL DUE PROCESS BY IGNORING CONTROLLING COLORADO PRECEDENT WHICH WOULD HAVE DEFEATED THE BASIS FOR SUMMARY JUDGMENT

The parties agreed and the District Court ruled that the issues would be controlled by Colorado law.[4] However, the District Court completely disregarded the controlling Colorado decision on misrepresentation in employment negotiations, which, had it been followed, would have precluded the basis for the Defendants' summary judgment motion by holding the Defendants responsible for their failure to adequately disclose the existence and intended affect of the LPA during employment negotiations with the Plaintiff class.

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[4] App. at p. A-20.

The District Court found that the Plaintiff class had "sufficient knowledge about the facts to raise their fraudulent inducement claim in the Colorado state courts" because a few members of the Frontier negotiating committee had allegedly discussed the existence of the LPA with their labor lawyer and allegedly knew its intended affect.[5] On the basis of this finding, the District Court ruled that the Plaintiffs should have raised an LPA-based fraud claim in connection with the Nicholau arbitration which took place under the terms of the JPA in 1987 (and which was later appealed to the Colorado courts) and the Frontier bankruptcy proceedings ongoing since 1986.

However, the Plaintiff class introduced evidence that during the September 1986 negotiations giving rise to the execution of the JPA, the LPA had been inadvertently disclosed by Lorenzo's representatives, immediately described as a non-existent (because it was unsigned) document, and just as immediately retrieved leaving *no copies* extant. Affidavit testimony was introduced by several former Frontier pilots that they had relied on the Defendants' representations concerning the non-existence of the LPA and that they had no reason to believe that an LPA-based fraud claim even existed until April of 1989 when Continental's representatives admitted - for the first time - that the LPA was, in fact, designed and intended to be a fully binding and applicable agreement governing arbitration and seniority integration into Continental Airlines.[6]

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[5] App. at p. A-26. Those same individuals submitted affidavits stating that they relied on the Defendant's misrepresentations that the LPA did not exist.

[6] The LPA, by its terms, applied to all of "the employees of the air carrier subsidiaries of PEI with regard to their seniority interest in the event of any future merger of airline operations involving any air carrier subsidiary of PEI...." Frontier Airlines was an air carrier subsidiary of PEI, and the former Frontier pilots were therefore employees of an air carrier subsidiary of PEI. Frontier Airlines was ultimately merged with Continental Airlines, and the District Court had previously found that the former Frontier pilots were

Affidavit testimony was also introduced - and never rebutted - that the Plaintiff class' labor lawyer *never saw* the LPA during the September 1986 negotiations, and Affidavits were submitted by the Plaintiff class' arbitration attorneys that there was no basis to believe that a legitimate LPA-based fraud cause of action existed prior to April of 1989.

A. The Controlling Colorado Decision of *Berger v. Security Pacific Information Systems*, 795 P.2d 1380 (Colo. App. 1990) Defeated the Basis for Summary Judgment by Placing an Affirmative and Full Duty of Disclosure on a Prospective Employer in Connection with Prospective Employees' Future Employment

To establish a claim for fraudulent concealment and non-disclosure under Colorado law, the "Plaintiff must show that the Defendant had a duty to disclose the information." *Berger v. Security Pacific Information Systems*, 795 P.2d 1380, 1383 (Colo. App. 1990). Under *Berger*, an employee's prospective employer has a duty to disclose all material information regarding the employee's future employment prospects and the employer's own financial situation. A "duty of full disclosure arises" whenever an employer's "representations concerning its own financial prospects and the prospective employee's future

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"affected employees" of that merger. The District Court later applied the LPA to the former Frontier pilots and compelled them to arbitrate under it in an Order issued on August 7, 1989 in the *PEX* case. (*supra*, note 1) The District Court had previously ruled in the *PEX* case that the same Defendants in this action were "legally estopped from denying" the application of the LPA. Whereas the District Court allowed the PEX pilots the full benefits of the LPA, the District Court refused to extend that same relief to the former Frontier pilots on the grounds that they already had a seniority integration under the arbitration provisions of the JPA. This ruling in the PEX case, by the same District Court Judge who later dismissed the Plaintiffs' claims in the case below, completely disregarded the former Frontier pilots' claims that the concealment and non-disclosure of the LPA had constituted a fraud upon them.

employment prospects reasonably induce a false impression as to those material factors in the mind" of the prospective employee. *Id.* at 1384. Although Plaintiff's counsel personally handed a copy of the *Berger* decision to the District Court, and extensively argued its application below, the District Court made no reference to or mention of the *Berger* decision in its Order.

(1) The Facts of *Berger*

The Plaintiff in *Berger* was terminated some eight months after a project she had been hired to manage was discontinued. The Plaintiff contended that her prospective employer "had fraudulently failed to disclose a substantial, known risk that the project would be discontinued in the near future." *Id.* at 1382. The jury awarded the Plaintiff both actual and punitive damages on her fraudulent concealment claim and the Colorado Court of Appeals affirmed.

Although the Defendant in *Berger* contended, as did the Defendants in this case, that "it had no duty to disclose information... to a prospective employee," the *Berger* court rejected that contention and held that a prospective employer has a duty of full disclosure as to all material information concerning a prospective employee's future employment, particularly where the prospective employer knows that its prospective employee is operating under a false impression because of the employer's lack of full disclosure. This duty of disclosure includes the duty to disclose even the known risk of future contingencies. *Id.* at 1382 - 85.

The *Berger* decision is on all fours with the facts of this case. Frank Lorenzo's representatives concealed both the existence and the intended affect of a separately negotiated arbitration and seniority integration agreement (the LPA) from the Plaintiff class during employment negotiations which ultimately resulted in a different, heavily preconditioned arbitration and seniority integration agreement (the JPA) being executed.

When the LPA was inadvertently disclosed in those negotiations, Lorenzo's representatives retrieved all copies extant and later denied the agreement's very existence through April of 1989. The Defendants should have fully disclosed the LPA, acknowledged its existence and intended affect, and answered all pertinent inquiries as to its application with full disclosure and candor rather than denials and misrepresentations. *Id.* at 1382-85.

The District Court's finding that the Plaintiff class allegedly knew all about the LPA in September of 1986 notwithstanding this lack of disclosure is directly contrary to the application of the *Berger* case, as well as the Affidavits presented by members of the class that they did *not* know about the LPA's significance until April of 1989. The Defendants acknowledged that they initially concealed and then later withdrew all copies of the LPA, and further admitted that they continued to deny both the LPA's existence and application until April of 1989.

Had the LPA been fully disclosed and made available to the Plaintiff class as required under *Berger*, the Plaintiff class would not, as their Affidavits attested, have agreed to the onerous arbitration terms of the JPA. The Defendants did not, by their own admission, comply with *Berger's* duty of full disclosure until April of 1989, all public comments preceding that date being to the effect that the LPA neither existed nor granted anyone any arbitration or seniority rights. After the Defendants' acknowledgment of the LPA in April of 1989, the United States District Court for the District of New Jersey ruled in a separate proceeding that the LPA would be enforced and arbitration thereunder compelled, and that the same Defendants in this action would be "legally estopped" from denying its intended affect.[7]

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[7] *Supra* at note 1.

II. THE DISTRICT COURT DENIED THE PLAINTIFF CLASS FUNDAMENTAL DUE PROCESS BY DENYING THE PLAINTIFF CLASS ANY DISCOVERY WHATSOEVER

Despite the existence of two separate Orders authorizing discovery entered by both the District Court and the United States Bankruptcy Court, the Defendants refused to produce requested information and documents relating to the existence of genuine issues of material fact in dispute between the parties, specifically whether the Defendants had concealed and misrepresented the LPA during the 1986 employment negotiations with the Plaintiff class. Most important, however, the discovery sought by the Plaintiffs and authorized by the referenced Court Orders went to the very issues on which summary judgment was entered, *to-wit*, whether the Plaintiff class knew or should have known of the existence of an LPA-based fraud claim prior to April of 1989.

As described above, the Plaintiff class submitted Affidavits that Defendants failed to make an appropriate and adequate disclosure of either the LPA or its intended affect on the Plaintiff class' prospective employment rights during the September, 1986 negotiations. The Defendants argued that several class members knew or should have known of the existence and significance of the LPA during those employment negotiations by virtue of the inadvertent disclosure, and therefore could have and should have raised an LPA-based fraud claim in the subsequent arbitration and bankruptcy proceedings. It was on this basis that the District Court entered summary judgment under the doctrines of *res judicata* and *collateral estoppel*.

A. To Grant a Party Discovery - and Then to Take it Away Once an Opposing Party Has Filed for Summary Judgment on the Very Issues on Which Discovery is Sought - Is the Very Essence of a Due Process Violation

The Plaintiff class sought all documents and internal records relating to the September 1986 negotiations, the drafting and negotiation of the LPA, and the basis for the Defendants' summary judgment argument under the doctrines of *res judicata* and *collateral estoppel*. In February of 1990, the District Court ordered written discovery to proceed, the production of documents to take place, and a deposition schedule to be worked out among the parties. The Plaintiff class served written Interrogatories and document production requests on the Defendants pursuant to that Court Order. The Defendants refused to answer the requested discovery and, up to and including the District Court's dismissal, never answered a *single* interrogatory or responded to a *single* request for production of documents.

In October of 1991, when the Bankruptcy Court lifted the automatic stay and authorized this action to proceed before the District Court, counsel for the Plaintiff class represented that the class' monetary damages case could be presented if the Defendants responded to the outstanding discovery requests and without the necessity of depositions "at this time." At *that* time no summary judgment motion was pending, and the Bankruptcy Court subsequently authorized such discovery to proceed.[8]

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[8] The District Court later denied the Plaintiff class' request to take limited depositions to rebut the allegations in the Defendants' summary judgment motion, ruling that "no amount of discovery would save the Plaintiffs' claims at this juncture." App. at pps. A35-A36. Even though the District Court's dismissal was predicated on the alleged personal knowledge of certain members of the Plaintiff class, and the alleged disclosure of the LPA in the September 1986 employment negotiations (which was strenuously disputed by those involved), the District Court erroneously concluded that testimonial evidence of those involved would be irrelevant to whether the LPA was adequately disclosed and understood by the Plaintiff class.

Plaintiffs sought compliance with the discovery orders entered by the District Court and the Bankruptcy Court, but the Defendants steadfastly refused to comply. After the summary judgment motion was filed, both Plaintiffs' litigation and bankruptcy counsel filed F.R.C.P. 56(f) Affidavits stating that the outstanding discovery was necessary to a defense to the *res judicata/collateral estoppel* argument because it would develop evidence that the Defendants had conspired to withhold pertinent information concerning the LPA and its intended affect on the Plaintiffs' employment prospects during the September 1986 negotiations. It was further anticipated that evidence that the Defendants had effectively concealed and misrepresented the LPA through 1989 would demonstrate that the Plaintiff class was unaware of the basis for, and therefore had no ability to raise, an LPA-based fraud claim prior to 1989.

The District Court ruled that "Plaintiffs' request for discovery is meritless and that no additional facts could be discovered that would prevent the application of the doctrines of *res judicata* and *collateral estoppel* to Plaintiffs' claims in this action."[9] This ruling was improper because it presupposed, without any legal basis, that evidence of the Defendants' concealment through 1989 of the existence and affect of the LPA would have had no bearing on the argument that Plaintiff class should have been on notice of an LPA-based fraud claim prior to 1989. To the contrary, this was the sole issue in dispute.

By ignoring its own prior Order authorizing discovery - which had never been answered - as well as the Bankruptcy Court's Order authorizing discovery - likewise never answered - the District Court deprived the Plaintiff class of even the most basic and fundamental due process considerations, e.g., to fully develop through discovery the basis for and rebuttal to the argument on which their claims could be dismissed. This was

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[9] App. at p. A35 .

contrary to both the state of the law in the Third Circuit and that enunciated by this Honorable Court.

B. Summary Judgment in Advance of Discovery is Error under Pronouncements by the Third Court and This Court

It is well settled that a "reasonable opportunity to complete discovery before grappling with a summary judgment motion is the norm." *Martin v. Malhazt*, 830 F.2d 237, 256 (D.C. Cir. 1986). In the Third Circuit decision of *Sames v. Gabel*, 732 F.2d 49, 51 (3d. Cir. 1984), it was held that a District Court commits error in granting a moving party's summary judgment motion while the non-moving party's Interrogatories remain unanswered:

> *This Court has criticized the practice of granting summary judgment motions at a time when pertinent discovery requests remain unanswered by the moving party.* [We] have said that where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course... *[B]y acting on the motion for summary judgment... without reference to what might be developed in discovery... the Court erred.*[10] [emphasis added]

[10] A premature grant of summary judgment while discovery remains outstanding is generally considered by the Third Circuit to constitute reversible error. *See e.g., Dowling v. City of Philadelphia*, 855 F.2d 136, 139 (3d Cir. 1988) (the Court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery); *Spurling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392, 398 (D. N.J. 1988) (summary judgment "must await a time until Plaintiffs have received a decent opportunity to conduct their own discovery"); *Chipolliani v. Spencer Gifts, Inc.*, 814 F.2d 893, 900 (3d Cir. 1987); *Arnold Pontiac GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986)(the grant of summary judgment "before the Plaintiff has had a full opportunity for discovery... may constitute reversible error"); *Mannington Mills v. Longoleum Industries*, 610 F.2d 1059 (3d Cir. 1979); *Costlow v. United States*, 552 F.2d 560, 563-64 (3d Cir. 1987).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), this Court held as follows:

> [T]he Plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the Defendants, *as long as the Plaintiff has had a full opportunity to conduct discovery*. We repeat, however, that the Plaintiff, to survive the Defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. [emphasis added]

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), this Court restated the proposition that summary judgment should properly be considered only "after adequate time for discovery" has been undertaken by the parties. Federal District Courts are "bound by the Supreme Court's determinations" that summary judgment motions are premature unless the parties "have been given adequate opportunity for discovery." *Noyola v. Texas Department of Human Resources*, 846 F.2d 1021, 1023 (5th Cir. 1988) (citing *Anderson v. Liberty Lobby, Inc. and Celotex Corp. v. Catrett*). *See also, Reiver v. Murdough and Walsh, P.A.*, 625 F.Supp. 998, 1004 (D. Del. 1985)(a "request for such continuance [to complete discovery] is to be granted as a matter of course."); *First Chicago International v. United Exchange Co., Ltd.*, 836 F.2d 1375, 1380 (D.C. Cir. 1985)(reversing entry of summary judgment and holding that "summary judgment is proper only after Plaintiff has been given adequate time for discovery.").

The District Court's erroneous conclusion that no amount of discovery could possibly affect its entry of summary judgment on *res judicata/collateral estoppel* grounds not only completely ignored the Rule 56(f) Affidavits filed by Plaintiffs' counsel, but also disregarded both its prior Order and that of the

Bankruptcy Court expressly authorizing that very same discovery. To grant a party discovery - and then to take it away once an opposing party files a summary judgment motion on the very issues on which discovery is sought - is the very essence of a fundamental due process violation.

III. THE DISTRICT COURT'S APPLICATION OF THE *RES JUDICATA/COLLATERAL ESTOPPEL* DOCTRINES IN ORDER TO ENTER SUMMARY JUDGMENT BASED ON DISPUTED GENUINE ISSUES OF MATERIAL FACT WAS A DENIAL OF FUNDAMENTAL DUE PROCESS

One clear, compelling and overriding theme runs through the facts in this case: That the Plaintiff class never knew they had and never previously litigated any LPA-based fraud claim prior to the filing of the proceedings below. The Defendants' argument - and ultimately the District Court's conclusion - that the Plaintiff class knew or should have known or was somehow on notice of an LPA-based fraud claim in September of 1986 was categorically disputed by Affidavits, Declarations, and Statements by members of the Plaintiff class and their counsel. The District Court's conclusion that *res judicata/collateral estoppel* operated to bar the Plaintiff class' claims was based on the *assumption* that the class must have known or somehow been on notice of an LPA-based fraud claim in September of 1986. No single issue was more hotly disputed or categorically contested before the District Court.

Both *res judicata* and *collateral estoppel* presuppose the existence of a claim or cause of action. It is axiomatic that a party cannot be held to have litigated - or had the opportunity to litigate - a claim which has not yet arisen. The claims below were filed within a matter of months of the Defendants' disclosures in April of 1989 relative to the LPA and even the District Court implicitly acknowledged that none of the Plaintiffs' claims were barred by statute of limitations. Rather,

the District Court simply imputed personal knowledge of facts and events which the Plaintiff class strongly denied in order to reach the conclusion that they should have brought their LPA-based fraud claim earlier, specifically either in conjunction with the Nicholau arbitration and subsequent court proceedings or the Frontier bankruptcy proceedings. This argument cannot, as a matter of law, survive an objective analysis.

The District Court determined that *res judicata* held that "an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim."[11] The District Court stated that *res judicata* requires an identity of parties and issues and applies only where there has been a final judgment on the merits in a prior suit involving the same parties or their privies to a subsequent suit based on the same cause of action.[12]

The District Court held that *collateral estoppel* applied to the final decision of the Court on an issue actually litigated and determined as conclusive of that same issue in any subsequent suit, and that *collateral estoppel*, unlike *res judicata*, did not apply to matters which could have been litigated but which were not.[13]

While correct as far as it went, the District Court's anaylsis ignored the guiding principle, as articulated by Justice Brennan in *Bang v. Ward*, 12 N.J. Misc. 415, 420, 97 A.2d 147 (1953), that only "when a party is afforded a fair opportunity to litigate a claim or cause of action . . . and suffers a final judgment . . on the merits" is *res judicata* applicable. It is undisputed that no final judgment "on the merits" of an LPA-based fraud claim has ever been rendered in any court at any time.

The District Court predicated its *res judicata/collateral estoppel* analysis on a finding that the Plaintiff class was on

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[11] App. at pps. A20-A21.

[12] *Id.*

[13] *Id.* at pps. A26-27.

"notice" of the LPA (and therefore apparently a fraud claim arising under it) in September of 1986, long before the claim (and hence a fair opportunity to litigate it) ever arose. In essence, the District Court concluded that the Plaintiff class was obliged to raise an LPA-based fraud claim prior to the Defendants' acknowledgement of the agreement's very existence, and that their failure to do so was of preclusive affect. This was a manifest injustice.

It was uncontested that neither the Nicholau arbitration and subsequent court proceedings nor the Frontier bankruptcy proceedings involved the same claim at issue below or adjudicated the merits of the LPA. Both proceedings were instituted several years prior to the disclosure of the LPA in April of 1989, neither proceeding adjudicated the rights of any parties relative to the LPA, and the merits of LPA-based fraud claim were never ruled on in either proceeding.

The purpose of the Nicholau arbitration, which commenced in early 1987, was to integrate the former Frontier pilots into Continental Airlines. A fraud claim which did not arise until April of 1989 could not have been decided, for *res judicata* purposes, in the Nicholau arbitration proceedings. Moreover, in *Dean Whitter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) this Court "pointed out that arbitration awards do not have the status of *res judicata* in Federal court proceedings." *See, Baker v. Paine Weber, Jackson and Curtis, Inc.*, 637 F. Supp. 419, 422 (D.N.J. 1986).

The District Court's erroneous conclusion that the Plaintiff class *could* have raised an LPA fraud claim in the arbitration was also contrary to the Affidavits of members of the Plaintiff class and their counsel that no such cause of action existed or could have been legitimately pursued prior to April of 1989. There was no identity of issues because the Nicholau arbitration involved the JPA, and not the LPA; nor was the same cause of action involved in the arbitration as is involved in the proceed-

ings below: The JPA arbitration sought to integrate the Plaintiff class into Continental Airlines, whereas the proceedings below involved a common law fraud claim based on the Defendants' concealment, non-disclosure, and misrepresentation of the LPA during employment negotiations.[14]

The inapplicability of collateral estoppel in such a proceeding follows *a fortiorari*. Collateral estoppel applies only to a cause of action which was actually litigated in a prior proceeding, not a claim which could have been litigated but was not. *Pomeroy v. Waitkus*, 517 P.2d 396, 399 (Colo. 1973).[15] The District Court completely disregarded was the fact that no final judgment on the merits of this requested relief was ever entered by either the Colorado Supreme Court or the Bankruptcy Court. After the April 1989 disclosure of the LPA, the Plaintiff class petitioned the Colorado Supreme Court and the Bankruptcy Court to hear a claim under the LPA; both courts denied the Plaintiff class' request. Neither court ever actually decided an LPA fraud issue or rendered a final judgment on the merits of an LPA fraud claim,[16] thereby rendering collateral estoppel unavailable as a matter of law. *Id.*

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[14] The District Court erroneously concluded that the issues in the Nicholau arbitration and the proceedings below were identical because the Plaintiff class had argued in the JPA arbitration that they were fraudulently induced into signing the JPA based on misrepresentations by Continental. While it is true that the Plaintiff class argued that various *other* misrepresentations occurred relative to the JPA, at *no* time was *any* claim advanced that the JPA was fraudulently induced by virtue of the concealment and misrepresentation of the LPA because that claim had not yet arisen. Under Colorado law, a Plaintiff who is on notice of one kind of fraud in a prior proceeding is not precluded from asserting fraud on a different basis in a later proceeding for money damages. *Altergott v. Yeager*, 543 P.2d 1293, 1296 (Colo. App. 1975) *cert. denied* 116 Colo. 379 (1976).

[15] The District Court acknowledged, but never properly applied the rule that Federal Courts must look to state law in determining the preclusive effect of an earlier state court or administrative proceeding. App. at p. A20.

[16] The Colorado Supreme Court, in hearing an appeal from the JPA-based Nicholau arbitration, did enter a final judgment on the Nicholau

Thus, with no other recourse and no other available remedy, the Plaintiff class filed their Complaint in the District Court below approximately five months after the April 1989 disclosure and the refusal by the Colorado Supreme Court and the Frontier Bankruptcy Court to hear such a claim. It was the proceeding below which raised, for the first time, a cause of action based on fraud for the concealment and misrepresentation of the LPA, and it is this action - and only this action - which has ever undertaken to adjudicate an LPA-based fraud issue. That adjudication was derailed when the District Court ruled that *res judicata* and *collateral estoppel* operated to bar the determination of an LPA-based fraud cause of action in this case.

IV. THE DISTRICT COURT'S IMPUTATION OF DISPUTED KNOWLEDGE TO THE PLAINTIFF CLASS IN ENTERING SUMMARY JUDGMENT WAS A DENIAL OF FUNDAMENTAL DUE PROCESS

The District Court repeatedly found that the facts concerning the knowledge of the Plaintiff class relative to the significance and affect of the LPA was "uncontroverted" and "undisputed."[17] In fact, nothing was *more* controverted and disputed in the proceedings below then the allegations by the Plaintiff class that they neither knew about nor were on notice of the LPA's significance and intended affect prior to April of 1989. As noted above, this position was supported by numerous Affidavits, Declarations, and Statements by members of the Plaintiff class and their counsel in the prior proceedings on which the District Court relied in entering summary judgment.

No trial has *ever* been held on the Plaintiff class' claims, and no prior proceedings have *ever* adjudicated any cause of

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arbitration itself. At no time, however, did *any* Colorado court ever decide *any* issues relative to the LPA or enter *any* final judgment on the LPA fraud claim.

[17] App. at p. A26.

action for fraud under the LPA. No undisputed or uncontroverted evidence was *ever* introduced below that members of the Plaintiff class knew about, were on notice of, or understood the significance or intended affect of the LPA, which the evidence showed to have been systematically concealed and misrepresented from September of 1986 through April of 1989.

In essence, the District Court placed itself in the position of an omnipresent and omniscient entity having absolute (and quite different) knowledge of events which transpired years before. It was entirely improper for the District Court to circumvent a determination by the jury as to the knowledge which the Plaintiff class possessed - or did not possess - during 1986 employment negotiations, which went not to the procedural viability of the class' claims, but rather to the substance and contested merits of the class' fraud allegations, which have never been heard.

A. The District Court had no Proper Basis on Which to Summarily Conclude and Impute Disputed Knowledge of Facts in September of 1986 to the Plaintiff Class Which the District Court Itself Found to Have Been Misrepresented Through April of 1989.

The Defendants admitted concealing and misrepresenting both the existence and the affect of the LPA from September of 1986 through April of 1989, a course of conduct characterized by the District Court (in the PEX case) as a "180-degree turnabout" preceeded by a "convoluted" and "incredible . . . torturing of documents."[18] The District Court ruled:

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[18] The District Court made these findings as part of its April 24, 1989 ruling in the PEX case that the LPA was binding on the corporate Defendants below and required seniority arbitration of the People Express, Frontier, and Continental pilots into Continental Airlines. The Court ruled: "To permit the corporate Defendants the right to legitimately evade their legal obligations under [the LPA] would constitute a manifest injustice. 'To allow a party to

> I daresay that the admission [that the LPA did exist and was intended to be binding] came at the last day of testimony, after a year and a half of haggling in Court here where the corporate Defendants had urged that there was no LPA agreement, but if there was an LPA agreement it was unsigned, and, therefore, not enforceable. A 180-degree turnabout by the corporate Defendants in this matter. [emphasis added]

A statement in a business transaction "while stating a truth so far as it goes, the maker knows or believes to be materially misleading because of its failure to state qualifying matters is a fradulent misrepresentation." *Banquet Arab v. Bulk Oil*, 726 F.Supp. 1411, 1422 (S.D.N.Y. 1989). Admittedly, the Defendants below know that their representations to the Plaintiff class in September of 1986 that the LPA did not exist were materially misleading and untrue.

No consideration was given by the District Court to its own rulings (in the PEX case) that the LPA had been misrepresented by the Defendants up to and including the "180-degree turnabout" which occurred in April of 1989. In short, the District Court charged the Plaintiff class with knowledge of facts in 1986 which the District Court *itself* found to have been misrepresented through 1989. This was a violation of the class' fundamental right to due process and an opportunity to be heard on the merits.

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assert the existence of a contract on the 17th floor of this Courthouse but to assert the non-existance of the the same contract on the 3rd floor, would be a self-serving act, *par excellence*, which should not be countenanced' and will not be countenanced by this Court."

CONCLUSION

No parties have been more diligent or more vigilant in asserting their legal rights then the Plaintiff class in this case. Within a matter of months of the first LPA admissions in April of 1989, the Plaintiff class filed suit in the proceedings below to litigate - for the first and only time - a claim of fraud under the LPA. There was no credible evidence and no uncontroverted facts tending to indicate that the Plaintiff class simply ignored an opportunity to raise an LPA-based fraud claim prior to 1989, and overwhelming evidence that the claim *did not even exist* until 1989 at the earliest.

Summary judgment is a drastic remedy which is never proper except where there is a complete absence of disputed facts and the Court concludes that no reasonable juror could find for the non-moving party on the basis of the evidence presented. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Accordingly, the Petitioners submit that a writ of *certiorari* should issue forthwith.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

Filed September 25, 1992

LETTER OPINION AND ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Re:Frontier Pilots Litigation Steering Committee
v. Texas Air Corp., et al
Civil Action No. 89-3879

Dear Counsel:

This matter comes before the court on defendants Continental Airlines, Inc.'s ("Continental") and Texas Air Corporation's ("Texas Air" or "TAC") (now "Continental Air-

lines Holdings, Inc." or "CTA") (collectively "Continental's") motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff, Frontier Pilots Litigation Steering Committee ("FAL Committee"), has cross-moved to amend its Complaint. In addition, plaintiff has appealed Magistrate Judge Hedges' Order, dated March 6, 1992, denying plaintiff's request for discovery pursuant to Fed.R.Civ.P. 56(f). Based on the reasons set forth below, defendants' motion for summary judgment is GRANTED and plaintiff's cross-motions are DENIED.

This case concerns the relationship of the Job Preservation and Litigation Settlement Agreement ("JPA") and the Labor Protection Agreement ("LPA") to one overall transaction: Continental's acquisition of People Express and Frontier Airlines and the integration of their respective pilot groups into Continental Pilot Seniority List. An explanation of the long and tortured history of this litigation is necessary to fully understand the issues currently before the court.

From late 1985 through most of 1986, Frontier was a wholly-owned subsidiary of People Express, Inc. ("PEI"). (*See* App. 85). [1] Frontier suspended all flight operations on August 24, 1986, never to start up again and it terminated virtually all employees at that time. (*See* App. 22 at § 4.6; App. 23 at § 5.1; App. 81, 90 n.19, 99, 101, 207-08, and 630). On August 28, 1986, Frontier and its affiliates filed for bankruptcy relief in the United States Bankruptcy Court for the District of Colorado in

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[1] As the defendants have correctly noted in their memorandum in support of their motion for summary judgement, the facts and supporting documents in this litigation are virtually identical to those involved in the companion case recently litigated before this court and the United States Court of Appeals for the Third Circuit. *People Express Pilots Merger Committee v. Texas Air Corp., et al*, Civ. No. 87-1155 (NHP) (the "PEX case"). As such, defendants have attached the relevant portions of the Joint Appendix from the appeal of that case. Page references to the Joint Appendix herein are designated as "App.___."

Denver seeking reorganization relief pursuant to Chapter 11 of the Federal Bankruptcy Code. (*See* App. 22 at § 4.6). In addition, Frontier surrendered its operations specifications to the Federal Aviation Administration. (*See* App. 81 n.1, 90 n.19).

Shortly thereafter, Texas Air expressed an interest in obtaining the assets of the non-operating Frontier and acquiring PEI's three remaining operating air carriers (People Express Airlines, Inc., Britt Airways, and Provincetown-Boston Airlines, Inc.) (*See* App. 81, 165, 728,732). On September 15, 1986 TAC and PEI entered into an Agreement and Plan of Merger to accomplish this goal. (*See* App. 15-16, 17-77, 99-131, 614). On the same day, as part of the same transaction, TAC, FAL, and two of FAL's affiliates, entered into an Asset Purchase Agreement pursuant to which TAC agreed to purchase substantially all of the remaining assets of Frontier and its affiliates. (*See* App. 52-77). An additional part of that transaction was an Option Agreement whereby TAC was given the right to purchase all of the outstanding stock of Frontier's parent, Frontier Holdings, Inc. (*See* App. 43-51). Both of these agreements concerning Frontier were conditions to the TAC-PEI Merger Agreement. [2] (*See* App. 32-33 at §§ 6.11; App. 38-39 at §§ 7.3(e), (k); App. 84).

On September 19, 1986, TAC and PEI filed a Joint Application for Expedited Exemption or For Approval of Acquisition of Control ("DOT Joint Application ") with the United States Department of Transportation. (*See* App. 78-98). The application was designed, *inter alia*, to "provide for the reemployment of more than 4,000 pilots, flight attendants, agents

[2] Although the closing of the Frontier Asset Purchase Agreement was a condition to the consummation of the TAC-PEI Merger Agreement, the implementation of the Asset Purchase Agreement was not conditioned on the TAC-PEI merger taking place. (*See* App. 93, 160). If TAC acquired Frontier's assets but the merger with PEI was not consummated, only half as many Frontier pilots would have been hired; and there would have been no seniority integration with Continental pilots. (*See Id.*)

and dispatchers who were recently terminated by Frontier. . . ." (*See* App. 81; *accord* App. 83, 86). Included with the DOT Joint Application were two documents referencing a mediation and arbitration process. The first document was the unsigned, two-page Labor Protection Agreement ("LPA"). (*See* App. 15-16, 955). The LPA provided as follows:

> WHEREAS, TAC and PEI have this date entered a Merger Agreement pursuant to which, subject to certain conditions and approvals, PEI will become a wholly-owned subsidiary of TAC, and
>
> WHEREAS, TAC and PEI desire to provide assurances to the employees of the air carrier subsidiaries of PEI with regard to their seniority interests in the event of any future merger of airline operation involving any air carrier subsidiary of PEI,
>
> NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:
>
> Following consummation of the aforesaid Merger Agreement, *in the event of a future merger of airline operations* involving any air carrier subsidiary of People Express, Inc., provision shall be made for fair and equitable seniority integration procedures, *for affected employees*. . ., which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator who shall be a member of the National Academy of Arbitrators. . . .The procedures shall be conducted, and the Neutral selected, by a Seniority Integration Committee . . . on each carrier participating in the merger. The committees shall consist of three members each, separately selected by the employees. . . on each participating carrier. The surviving merged carrier may participate as a party to the selection and the proceedings, but in no event shall any final solution be reached which is

> not acceptable to each Committee (by majority vote), unless such solution is imposed by the Neutral provided for herein. The Seniority Integration Committee, or the Neutral, shall have no authority to alter or vary the employment policies of the employing carrier.

(*See* App. 15-16) (Emphasis supplied).

Defendants contend that, on at least two occasions between September 15, 1986 and October 2, 1986, the Frontier pilots were shown the LPA during the protracted and intense negotiations with Continental concerning the terms of their seniority integration to be conducted under a separate arbitration document. (*See* App. 405-06).

The second document filed with the DOT that mentioned the arbitration was the unsigned Frontier-Continental Job Preservation Agreement ("JPA"), also referred as the "Union Agreement". (*See* App. 99-131). The draft JPA provided, *inter alia*, that Continental would acquire certain assets of Frontier while simultaneously extending job guarantees or severance payment and/or airline flight passes to former Frontier employees; in exchange, at least 75% of the FAL pilots were required to waive claims (except certain bankruptcy claims) against Frontier and others. (*See* App. 34 at § 6.17; App. 39 at § 7.3(1); App. 99-131). The draft JPA provided, in pertinent part, as follows:

> WHEREAS, Frontier Airlines ceased airline operations on August 24, 1986 and thereupon terminated all active employees and filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the U.S. Bankruptcy Code on August 28, 1986; and
>
> WHEREAS, the Union Parties desire . . . to induce CAL to enter this Agreement, to induce TAC to acquire Frontier's assets and to induce CAL to offer

employment to former Frontier employees as provided herein:

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

8(c) (3) *Integrated Seniority List.* As soon as determined practicable by Continental, former Frontier pilots shall be merged into Continental's pilot System Seniority List pursuant to fair and equitable seniority integration procedures, which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator, who shall be a member of the National Academy of Arbitrators. The procedures shall be conducted, and the Neutral selected, by two Seniority Integration Committees, of three members each, one committee selected by the former Frontier pilots, the other committee selected by the Continental Pilot Operations on behalf of the non-Frontier incumbent pilots of Continental . . . .Continental may participate as a party to the selection and proceedings, but in no event shall any final solution be reached which is not acceptable to each Committee (by majority vote) unless such solution is imposed by the Neutral provided for herein. *Said Neutral shall take special notice of the non-operating status of Frontier Airlines immediately prior to the date of this Agreement and the limited employment prospects for Frontier employees resulting therefrom.* Said Neutral shall have no authority to alter or vary the employment policies of Continental.

(*See* App. 99-100, 117-18) (Emphasis supplied).

The JPA was a fundamental basis to the September 15, 1986 transaction.[3] Pursuant to the TAC-PEI merger agreement,

[3] Although the JPA was in draft form when it was filed with the DOT on September 19, 1986, the TAC-PEI Merger Agreement required that the JPA

PEI was required to seek to have the FAL Pilots' Union ALPA, and other unions enter into the Union Agreement and implement its terms. (*See* App. 32-34 at § § 6.12 and 6.17). PEI and its subsidiaries were prohibited from entering into any agreement with the FAL Pilots that would "be inconsistent with the Union Agreement" without TAC's consent. (*See* App. 25-26 at § 5.1(j), (k), (m)). Both TAC and PEI, and their subsidiaries, were required to agree to labor protective provisions ("LPPs") "no more onerous than the undertakings agreed to in the Union Agreement," (*See* App. 29 at § 6.2). Indeed, TAC was permitted to withdraw from the deal had the government issued any order, or PEI entered into any agreement, imposing "labor protective provisions more onerous than the undertakings agreed to in the Union Agreement." (*See* App. 37-38 at § 7.3(a), (c), (f). In parallel fashion, the Frontier Asset Purchase Agreement provided that, upon closing of the asset acquisition, TAC intended to extend offers of the asset acquisition, TAC intended to extend offers of employment to FAL Pilots (upon the terms and conditions set forth in the proposed 'Union Agreement'." (*See* App. 52). The Asset Purchase Agreement contained the same condition found in the main Merger Agreement prohibiting the imposition of LPPs. (*See* App. 67 at § 8.4) The DOT Joint Application recited the JPA as being the first labor condition to effectuation of the TAC-PEI Merger Agreement and explained that imposition of LPPs more onerous than those in the JPA would cause the entire transaction to fail. (*See* App. 87, 88 n.18, 93, 95, 96-97; App. 121-22 at § 12).

Between September 15, 1986 and October 1, 1986, Continental engaged in intense negotiations over the JPA with the Frontier Pilots, their counsel, their collective bargaining representative (ALPA), and ALPA's counsel. (*See* App. 194, 269, 276, 308, 325-26, 342, 405-06). As Arbitrator George Nicolau

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remain in "substantially" the same form after negotiations with the pilots. (*See* App. 32-33 at § 6.12).

later found, the Frontier Pilots were "represented by able and experienced counsel and [were] themselves sophisticated bargainers." (*See* App. 184; *accord* App. 195). The FAL Pilots "vigorously protested" the "non-operating status" language of the JPA underlined above, and Continental, with equal vigor, refused to withdraw that language. (*See* App. 195-95). On October 2, 1986, the Frontier Pilots approved the JPA by unanimous vote at a union conducted meeting. (*See* App. 325, 342, 438). The International executed the JPA on October 6, 1986, and the requisite number of waivers by individual Frontier Pilots was received by October 15, 1986. (See App. 440-45). On October 15, 1986, CAL and PEI executed a signed copy of the JPA. (*See* App. 132-47). Treatment of seniority for competitive purposes (bidding, etc.) was addressed in § 8(b), which incorporated by reference at "Side Letter No. 2" with the Frontier Pilots. (*See* App. 143). That Side Letter included, at ¶ 3, substantially the same language for integration of the Frontier Pilots that had previously appeared in ¶ 8(c) (3) of the draft JPA set forth above. (*See* App. 149-50, 182). The absence of LPPs more onerous than those agreed to by Continental in the October 15, 1986 JPA remained a condition to consummation of the TAC-PEI merger. (*See* App. 234-35; App. 260 at ¶ (iv); App. 261 at ¶¶ (iii), (v); App. 263; App. 273-74 at ¶ (vi)).

The DOT tentatively approved the proposed agreements on October 15, 1986. (*See* App. 159-63). The DOT found that no LPPs should be imposed, citing Frontier's termination of operations, TAC's agreement to hire a significant number of Frontier employees, the Merger Agreement's clause permitting TAC to withdraw if LPPs were imposed, and the likelihood that TAC in fact would do so. (*See* App. 162-63). The Denver Bankruptcy Court approved the Frontier agreements, including Side Letter No. 2, on October 17, 1986. (*See* App. 243, 412). The DOT gave final approval to the agreements on October 24, 1986, reciting the same factors it had previously addressed in its October 15, 1986 Order. (*See* App. 164-70, 243). On October

30, 1986, TAC exercised the option to acquire Frontier's stock, thus making it a wholly-owned subsidiary of TAC. (*See* App. 243, 263). Between October 31, 1986 and November 15, 1986, TAC consummated the acquisition of Frontier's assets. (*See* App. 243; App. 261 at ¶ (ii); App. 263). The TAC-PEI Merger Agreement was approved by the shareholders of People Express, who specifically ratified the October 15, 1986 JPA during a shareholders' vote conducted on December 29, 1986. The TAC-PEI merger was ultimately consummated on December 30, 1986. (*See* App. 615, 956).

The Frontier Pilots then selected a Merger Committee as did the Continental Pilots. With the assistance of counsel, the Frontiers Pilots negotiated with the Continental Pilots in an effort to reach a voluntary agreement regarding their seniority integration. These attempts, however, were unsuccessful. (*See* App. 327 at ¶7.) On January 7, 1987, the two Committees, along with Continental, executed a document outlining arbitration procedures consistent with Side Letter No. 2. (*See* App. 303-05). Paragraphs I and II.3 of the procedures document stated that the decision of the Neutral would be "final". (*Id.*)

THE FAL LITIGATION

The seniority integration dispute between the FAL and Cal Pilots was submitted to arbitration pursuant to the JPA, Side Letter No. 2, and the negotiated procedures document. Arbitrator George Nicolau conducted eleven (11) days of formal hearings from March to May 1987. (*See* App.. 172, 308).[4] The transcript of the hearing totaled 2,691 pages, and nearly 200 exhibits were introduced into the record in the Nicolau arbitration. (*See* App. 172, 313). There was a mediation of the various issues involved in the integration of the two pilot groups both

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[4] Arbitrator Nicolau was experienced in airline labor relation and was selected by the Frontier and Continental Senior Integration Committees under the procedures document.

before and after the arbitration proceedings; however, the mediation efforts proved unsuccessful. (*See* App. 172). On June 15, 1987, Arbitrator Nicalau issued his 57 page final Opinion and Award ("Nicolau Award ") (*see* App. 171-222). Arbitrator Nicolau rejected virtually all of the Frontier Pilot's arguments advanced during that arbitration.[5] (*See* App. 187, 329, 344-45). Nicolau's award ordered that, following implementation of his list, "the future job bidding status, furloughs, and recall rights of Continental pilots, including former Frontier pilots, shall be determined on the basis of said List and Continental's Pilot Employment Policy." (*See* App. 221 at ¶ 1.E *accord* App. 219).

The former FAL pilots, dissatisfied with Nicolau's decision, filed a petition to vacate the Nicolau Award in the District Court for the City and County of Denver, Colorado on September 4, 1987. *In the Matter of the Seniority Integration of Continental Airlines and former Frontier Airline Pilots*, 87 Cv. 17810 (Colo.Dist.Ct.). *See* App. 307-10; App. 330-31 at ¶¶ 12-13; App. 345-46. This case was filed pursuant to the Colorado Uniform Arbitration Act, Colo. Rev. Stat. §§ 13.22-201 *et seq*. The Frontier Pilots were represented in that proceeding by Mr. McGuinn. (*See* App. 309). In general, the Frontier Pilots argued that the arbitration that they had been guaranteed by the JPA. (*See* App. 314, 316, 319-21). Frontier also con-

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[5] During the arbitration before Arbitrator Nicolau, the Frontier Pilots relied upon their asserted versions of the bargaining history of the JPA and Side Letter No. 2, as opposed to the language of the JPA. (*See* App. 184). Arbitrator Nicolau rejected their approach, noting that "it was their responsibility, given the evidence they had, to insist that the [fact in dispute] be memorialized in the JPA." (*See* App. 191). With respect to another dispute, Nicolau made the same observation: "if they [the FAL Pilots] wanted [a provision], it was up to them to obtain that [provision] in writing. They were not, by any means first-timers in negotiations. They knew the risks. They knew the critical importance of words written into an agreement." (*See* App. 195).

tended that Arbitrator Nicolau failed to take into account evidence with respect to the negotiation of the JPA. (*See* App. 308 at ¶¶ 4,6). On June 30, 1988, the Colorado State District Court (Flowers, J.) dismissed Frontier's petition. (*See* App 323; App. 331 at ¶ 14; defendants' Exhibit C in support of their motion for summary judgment (transcript of bench ruling)). The FAL pilots appealed that decision to the Colorado Court of Appeals on the same grounds. (*See* App. 396-97, 399-400). The District Court's decision was subsequently affirmed by the Colorado Court of Appeals on December 21, 1989. (*See* defendant's Exhibit D in support of motion for summary judgment).

On March 26, 1990, the FAL pilots filed a petition for *certiorari* with the Colorado Supreme Court maintaining that the Nicolau Award should be vacated and that they should be permitted to proceed with a seniority integration based upon the LPA and for "such other and further relief as may be appropriate". (*See* defendants' Exhibit E. at ¶ 12, filed in support of their motion for summary judgment). The FAL Pilots argued that this relief should be granted as a result of the alleged misrepresentations by Continental's negotiators during the JPA negotiations concerning the LPA and statements to the DOT. *Id.*, passim. The Colorado Supreme Court denied Frontier's petition on August 13, 1990, thereby terminating all direct attacks on the Nicolau Award. (*See* defendants' Exhibit F in support of their motion for summary judgment.)

THE PEX LITIGATION

Against the background of Arbitrator Nicolau's decision, the FAL Pilots claimed that they feared they would lose what they had secured to the PEX Pilots if this court were to award an arbitration under the LPA in the *PEX* case. (*See* App. 354, 355 at ¶ 17). Thus, although Frontier had previously refrained from intervening in the PEX litigation,[6] they concluded in

[6] The PEX litigation was commenced by the People Express Pilots on April 1, 1987 before this court. The Complaint did not raise any issue relating

September 1988 "that it would be prudent to intervene in [the PEX] case in order to insure the Frontier Pilot's right to participate in a People Express-Continental Arbitration". (*See* App. 332 at ¶ 16; *accord* App. 347). On October 20, 1988, Frontier finally moved to intervene as a defendant in the *PEX* case, and they were again represented by Mr. McGuinn. (*See* App. 337). The FAL Pilots explained their position in their moving papers as follows:

> The Frontier pilots are now integrated into the Continental pilot workforce . . . .
>
> The Steering Committee, acting on behalf of the Frontier pilots, seeks a *very limited role* in this litigation. The Committee seeks only to ensure that the Frontier pilots are entitled to be represented by the Steering Committee in any subsequent arbitration between the Peoples Express pilots, Continental, and the remaining Continental pilots . . . .
>
> While *the seniority rights of the Frontier pilots at Continental were already decided in a prior arbitration proceeding*, the Frontier pilots must be represented during the Continental-People Express arbitration to protect their existing seniority rights . . . . . All pilots employed by Continental are part of a single, integrated workforce . . . .

(App. 339-40) (Emphasis supplied). This rationale for intervention was corroborated by the Affidavit of Robert L. Williams, the FAL Pilots' merger chairman:

> The purpose for the Steering Committee's motion to intervene in the People Express Merger Committee litigation is *solely* to ensure that the Frontier pilots will

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to the FAL Pilots *Oua*. FAL Pilots, but rather sought an arbitration to integrate the PEX Pilots in to the Continental Pilot Seniority List (which, at the time the FAL Pilots had intervened, already included the FAL Pilots).

> be entitled to be represented in a People Express-Continental arbitration concerning pilot seniority rights . . . . The Frontier pilots must be represented during that arbitration in order to prevent any *encroachment on the seniority rights and other terms and conditions of employment currently held by the Frontier pilots.*

(App. 333-34 at ¶¶ 18-19) (Emphasis supplied).

"The Frontier pilots are now integrated into the Continental pilot workforce. . . . The Steering Committee, acting on behalf of the Frontier pilots, seeks *a very limited role* in this litigation." (App. 339) (Emphasis added).

Based on the above representations of the FAL pilots I granted FAL's motion to intervene and held as follows:

> Pursuant to an arbitration award filed in June of [1987], the Frontier pilots became fully integrated into the Continental pilot work force. However, the arbitrator's opinion and award is currently being challenged by the Frontier pilots in the Colorado Court of Appeals. The list established by the arbitrator remains in effect pending resolution of the appeal by the Colorado Court. The pilots now seek to intervene in this litigation *to prevent a possible change in their existing seniority possible change in their existing seniority status* that may result from this litigation.
>
> * * * *
>
> Therefore, to ensure that the Frontier pilots; interests in this judicial proceeding are adequately represent, I will grant their motion for intervention.
>
> * * * *
>
> [T]he Frontier pilots intervened in this action to *preserve* their relative seniority status on the Continental integrated pilot list. Their interest in maintaining that status, whether it be by convincing this

> Court that arbitration is not required, or at a joint arbitration with People Express pilots, is a commonality shared by all Continental pilots. Thus, *for the sole purpose of having their seniority status remain unchanged* by an arbitration with People Express, the Frontier pilots and Continental pilots have identical claims in this action.
>
> I am aware of the appeal of the Frontier-Continental arbitration now pending in the Colorado Court of Appeals. There the Frontier pilots and Continental pilots are clearly adversaries. The Continental pilots seek to maintain the existing seniority structure while the Frontier pilots seek the benefits of restructuring. *In the instant case, however, both pilot groups are interested in maintaining their existing seniority status relative to People Express pilots.*

(App. 370, 374, 376-77). (Emphasis supplied). *Accord* App. 388.

On March 9, 1989, prior to the trial in the *PEX* litigation, the FAL Pilots *first advanced* their argument that Continental had committed "actionable misrepresentation and fraud" during the negotiation of the JPA by failing to advise the FAL Pilots about their supposed rights under the LPA. (*See* Defendants' Exhibit G at ¶ 12). This argument was made in an attempt to secure a role in any LPA-based arbitration and to avoid the results of the Nicolau arbitration.

Following a bench trial in the *PEX* case, I granted the PEX pilots' request for arbitration in a bench ruling of April 24, 1989. After rendering that decision, I requested a new round of briefing on the issue of why the FAL Pilots as fully integrated Continental pilots, should not be bound by the Nicolau Award. (*See* App. 963-64). In responding to my inquiry, the FAL Pilots argued on May 11, 1989 that:

> The Nicolau Award should have absolutely no preclusive effect and that the LPA arbitrator should expressly not take that Award into account in any respect. . . . Continental is estopped from making any argument of issue preclusion because it engaged in fraud and misrepresentation with respect to the representations or lack thereof regarding the LPA.

(*See* Defendants; Exhibit H at ¶ 28). The FAL Pilots further stated that they "would prefer an early resolution by this court of any claim of *res judicata*. . . .[T]he Frontier pilots would prefer that this court consider the merits of any contention regarding the effect of the Nicolau Award. A pre-arbitration determination would be preferable from a practical standpoint." (*See* App. 435-36).

Upon consideration of this and other arguments advanced in the papers, I issued an August 7, 1989 Order restricting The FAL Pilots to the JPA arbitration results as follows:

> The Frontier Pilots Litigation Steering Committee's participation in this arbitration shall be circumscribed by the Final Award of Arbitrator George Nicolau, dated June 15, 1987. FAL may not asset a position inconsistent with the Arbitration Award but shall, for the purposes of this arbitration, be deemed bound by that award. The Award of Arbitrator Nicolau is currently under appeal. In the event, at any time proir ro the Final Arbitrator's Award in this matter, the decision of Arbitrator Nicolau shall be reversed or modified, any party may make application to this Court, on short notice, to consider the impact of that determination upon this arbitration proceeding.

(*See* App. 474).

On November 2 ,1989, the FAL Committee filed an application in the *PEX* case requesting this court to modify its

Order Compelling Arbitration to remove the restriction because the JPA was allegedly procured by either intentional misrepresentation or mutual mistake of fact or law, or, alternatively, under the doctrine of equitable estoppel. (*See* Defendants' Exhibit J). The FAL Committee failed, however, to inform this court that it had previously filed the instant litigation on September 19, 1989. The FAL Pilots raised the following arguments in their motion to modify:

> Thus, at the very same time that the corporate defendants were promising the DOT that the Frontier pilots would . . . be entitled to a 'fair and equitable' seniority integration, as evidenced by the joint application and the LPA [filed with the Department of Transportation], they misrepresented the import of documents they filed with the DOT to the Frontier pilot committee and instead presented that committee with the JPA's Side Letter No. 2. . . . .
>
> Plainly put, the corporate defendants stonewalled the FAL pilot committee on the *legal significance of the LPA* up to the point that the FAL pilot committee reasonably believed that the JPA, with its onerous Side Letter No. 2, was the only game in town, and that the stark alternatives were either the JPA with Side Letter No. 2 or no job for any pilots.

(*See* Defendants' Exhibit J, at ¶¶ 12, 15, submitted in support of defendants' motion for summary judgment). This court denied the FAL Committee's motion to modify. (*See* Defendants' Exhibit L).

Pursuant to my Order Compelling Arbitration in the *PEX* litigation, hearings commenced before Arbitrator Jerome Ross on May 7, 1990. Arbitrator Ross Conducted 73 days of hearings and he reviewed extensive briefs submitted by the parties. The hearings were concluded and the record was closed with oral arguments on April 29, 1991. On August 13, 1991, Arbitrator

Ross rendered a 135 page Opinion and Award ("Ross Award") integrating the Pilot Seniority Lists of People Express Airlines and Continental Airlines (which had already included the former Frontier pilots by virtue of the Nicolau Arbitration Award).

Subsequently, the FAL Pilots filed a petition in this court to vacated the Ross Award. Thereafter, I affirmed the Ross Award by Order, dated November 22, 1991, and in an Opinion that followed on November 26, 1991. In relevant part, this court stated as follows:

> In my view, to the extent that Arbitrator Nicolau integrated the FAL pilots with the Continental pilots, the FAL and the Continental pilots became one body. Essentially, they had the same interests to protect. They each had a position on a pilot seniority list which they had attained as a result of the Nicolau Arbitration Award. I refused to allow the FAL pilots to argue for a change of their position on the seniority list vis-a-vis the Continental pilots in the arbitration proceedings before Arbitrator Ross. If I permitted such conduct, then I would be encouraging a collateral attach on the award issued by Arbitrator Nicolau before the Colorado Supreme Court could issue a final determinator on that award.
>
> However, I permitted the FAL pilots to participate in the Ross arbitration in an effort to allow them to protect whatever position they had attained as a result of the Nicolau Award vis-a-vis the People Express pilots who were to be integrated by virtue of Arbitrator Ross' Award. Moreover, my Order, dated August 7, 1989, provided that any party may make application to this court, on short notice, to consider the impact, if any, of a reversal or modification of the Nicolau Award issued prior to the completion of the Ross arbitration proceedings. Since the Colorado

> arbitration Supreme Court has already affirmed the Nicolau Award, I refuse to change my position and collaterally overrule the Nicolau Award.

(*See People Express Merger Committee, etc. v. Texas Air Corporation, et al*, Civil Action No. 87-1155, Opinion dated November 26, 1991 at ¶¶ 19-20).

The United States Court of Appeals for the Third Circuit affirmed this court's Opinion in a *per curiam* Judgment Order, dated February 13, 1992. The Third Circuit's ruling confirmed this court's determination that the FAL Pilots were not third-party beneficiaries of the LPA and that they properly were bound to their arbitration under the JPA. Having litigated this issue once in the Colorado state court system and again in the federal court in the *PEX* litigation, the FAL Pilots now focus their efforts on the instant law suit.

The FAL Pilots filed their original Complaint in this law suit on September 19, 1989.[7] The original two-count Complaint included claims of misrepresentation and breach of contract of third-party beneficiary contract. The gravamen of the FAL Pilots' misrepresentation claim (Count 1) is that Continental fraudulently induced them to sign the JPA, a different arbitration contract, by representing to them that the LPA was a "meaningless document". The crux of the FAL's contract claim (Count 2) is that this court allegedly held them to be third-party beneficiaries of the *PEX* case.[8]

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[7] Initially, Frontier failed to advise anyone about this case and did not attempt to serve any of the defendants. When this court threatened to dismiss their law suit, the FAL Pilots finally served Continental and Texas Air on January 15, 1990, two day prior to the expiration of the 120 days permitted under Rule 4(j) of the Federal Rules of Civil Procedure.

[8] Approximately one full year after this litigation had been instituted, the FAL Committee took the opposite position before the federal district court in Colorado, *i.e.*, the FAL Committee claimed that this court had "failed to resolve the issue as to whether the LPA or the JPA [was] the operative document for the [FAL Committee] for the arbitration ordered by the New

THE FAL PILOT'S PROPOSED *AMENDED COMPLAINT*

The FAL pilots allege that the most recent version of their complaint is based on "new matters" and "[a]dditional facts and documents [that] have recently come to the attention of plaintiff and its counsel through discovery and related arbitration proceeds. *See* FAL Application at ¶¶ 2, 4. No where do plaintiffs state what these supposed "additional facts" are. I have thoroughly reviewed the proposed Amended Complaint and I find that it is based entirely on information known to plaintiffs before they filed this law suit on September 19, 1989, and, long before I entered my August 7, 1989 Order Compelling Arbitration. The only "news event" are that the *PEX* arbitration was completed as directed by this court's Order, and the Ross Award was affirmed by the Third Circuit Court of Appeals. The proposed Amended Complaint refers to these events as "new facts". *See* ¶ 38 of plaintiff's proposed Amended Complaint.

The principal differences between plaintiff's original Complaint and the proposed Amended Complaint ar in form and not in substance. This superficial change in draftman's language cannot operate to save plaintiff's claims. As much, I HEREBY DENY PLAINTIFF'S REQUEST FOR LEAVE TO FILE THEIR PROPOSED AMENDED COMPLAINT. It is well settled in the law that a party cannot amend a complaint while there is a motion for summary judgment pending, or soon to be filed, that is likely to be successful. *See Kennedy v. Josephthal & Co., Inc.*, 635 F. Supp. 399, 405 & n.1. (D.Mass 1985), *aff d*, 814 F.2d 798 (1st Cir. 1987); *Turner v. Parsons*, 620 F. Supp. 138, 139, 143 (E.D.Pa. 1985), *aff d*, 787 F.2d 584 (3d Cir. 1985), *cert denied*, 476 U.S. 1160 (1986); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 643, at 643-45 n.26 (1990

Jersey Court," and the FAL Committee thus argued that the Colorado district court should decide that issue. *Former Frontier Pilot Litig. Steer. Comm. v. Frontier Airlines, Inc.*, 117 B.R. 588, 590 (D.Colo. 1990).

Ed.) (Citations omitted)[9] Assuming arguendo, the FAL pilots were permitted leave to file their proposed Amended Complaint, their Complaint would nonetheless be dismissed as a matter of law for the same reasons discussed below.

PLAINTIFF'S CLAIM FRAUDULENT MISREPRESENTATION (COUNT 1)

As previously stated, the basis of plaintiff's misrepresentation claim is that Continental fraudulently induced them to sign the JPA, a different arbitration contract, by representing to them that the LPA was a "Meaningless document" and should be ignored. Defendants contend that this claim is barred under the applicable doctrines of *res judicata* and collateral estoppel. I agree.

Res judicata, or claim preclusion, "refers to the effect of a judgment in foreclosing litigation of a matter that has never been litigated, because of a determination that it should have been advanced in an earlier suit." *Miora v. Warren City School District Board of Education*, 465 U.S. 75, 77 n. 1 (1984). "Federal courts must look to state law in determining the preclusive effect of an earlier state court or administrative proceeding." *Pittman v. La Fontaine*, 756 F. Supp. 834 (D.N.J. 1991) (citing *McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 275 (3rd Cir. 1989), *cert. denied*, 110 S.Ct. 1783 (1990)).

This is a diversity action and counsel for both parties agree that Colorado law governs this case under the governmental interest analysis employed by New Jersey courts in determining which state's law to apply. *See System Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1137 (3d Cir. 1977). Under Colorado Law, *res judicata* refers to claim preclusion, and the doctrine holds that an existing judgment is

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[9] As previously noted, Continental moved for summary judgment on the basis of plaintiff's original complaint before any of the three subsequent motions to amend filed by the FAL pilots.

conclusive of the rights of the parties in any subsequent suit on the same claim. *Pomeroy v. Watkus*, 517 P.2d 396, 399 (Colo. 1973). The doctrine of *res judicata* bars relitigation not only of all issues actually decided, but of all issues that might have been decided. *Id.* In addition, the doctrine of *res judicata* requires an identity of parties or their privies. *Id.*[10] *Res judicata* applies if there has been: (1) a final judgment on the merits; (2) a prior suit involving that same parties or their privies; and (3) a subsequent suit based on the same cause of action. *Id.* (*See also Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963-64 (3d Cir. 1991); *United States v. Athlone Industries, Inc.*, 746 F.2d 977, 983 (3d Cir, 1984)).

As the Third Circuit of Appeals remarked in *Athlone*, the doctrine of *res judicata* is expansively applied:

> [W]e indicated a predisposition towards taking a broad view of what constitutes identity of causes of action — 'an essential similarity of the underlying events giving rise to the various legal claims.' We, therefore, do not adhere to any mechanical application of a single test but instead focus on the central purpose of the doctrine of res judicata. We are thus in keeping with '[t]he present trend in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence.

Athlone, 746 F.2d at 984 (*quoting* 1B Moore's Federal Practice ¶ 0.41[1] at 359 (2d Ed. 1983)). In conducting this inquiry, the court should "focus on 'whether the acts complained of were the same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same.'. . . a mere difference in

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[10] The court notes that the substantive law of *res judicata* is the same under both federal and Colorado state law.

the theory of recovery is not dispositive." *Lubrizol, supra*, 929 F.2d at 963.

Application of the doctrine of *res judicata* set forth above precludes the FAL pilots from pursuing this action. First, there has been at least one final judgment on the merits. In this regard, the FAL pilots have unsuccessfully challenged the Nicolau Award at each and every level of the Colorado state courts. As such, there have been three final judgments on the merits of the *FAL* case. In the final appeal filed by the FAL pilots, the Supreme Court of Colorado denied *certiorari*. Second, the *FAL* litigation was clearly a prior suit involving the same parties as this case. Third, under the majority rule, adopted by both the Third Circuit Court of Appeals and the Supreme Court of Colorado, there is no doubt that the two cases must be viewed as the same cause of action. In this respect, although the FAL pilots portray their complaint as presenting "new" legal claims based on unspecified "new facts", they cannot escape the "essential similarity of the underlying events". *Althone, supra*, 746 F.2d at 984. Both cases concern the same transaction and the legal effect of the same document. Specifically, both cases involve the integration of the former FAL pilots as part of the 1986 airline acquisitions, and their dissatisfaction with their JPA-based arbitration. (*See* App. 308 at ¶ 6; Plaintiff's original Complaint at ¶¶ 20, 21; Plaintiff's proposed Amended Complaint at ¶¶ 26, 28). Is it clear that, both cases, the FAL pilots are complaining of the same acts of Continental; the material facts are the same; and the witnesses and documentation required to prove the allegations are virtually identical.

Accordingly, all of the FAL pilot's current legal theories either were or should have been litigated in the *FAL* litigation in Colorado. In this regard, I note that, in their brief to the Colorado-trial level court to vacate the Nicolau Award, the FAL pilots argued that the Nicolau Award was invalid, *inter alia*, because the "elements of fraud. let alone misrepresentation, are

omnipresent." (*See* Defendant's Exhibit P in support of their motion for summary judgment at ¶ 74). The FAL pilots further argued that Arbitrator Nicolau had "fail[ed] to take cognizance of evidence presented by the Frontier pilots, including critical uncontroverted evidence with respect to the negotiations of the Job Preservation Agreement. . . ." (*See* App. 308 at ¶ 6). In other filings in the *FAL* action, the FAL pilots made the same factual made the same factual allegations that they advance here, *i.e.*, that misrepresentations concerning the LPA and the DOT filings by Continental's negotiations in the JPA negotiations, mislead the former FAL pilots to approve the JPA, and that they were not accorded the arbitration to which they claim they were entitled under the LPA.

At oral argument on defendants' motion for summary judgment conducted on July, 27, 1992, Kenneth A. B. Roberts, Jr., current counsel for plaintiff, argued that the FAL pilots could not have asserted their common law fraud claim in the FAL litigation in the Colorado state courts in 1987 because they did not have the basis to assert it. Mr. Roberts further argued that the basis for the common law fraud claim did not arise until this court ruled on April 24, 1989, that the PEX pilots were entitled to arbitration under the LPA agreement. This argument is clearly without merit. In this regard, the court notes that, on the evening of September 15, 1986, at approximately 6:00 p.m., the FAL pilot negotiating team met with Continental's negotiators, Mr. John Adams and Jack Gallagher, Esq. (*See* Defendants' Exhibit MM at p. 280). Mike Abram, the attorney for FAL pilots during the JPA negotiations, was in attendance at the September 15, 1996 meeting. (*See* Defendants' Exhibit MM at p. 281). During this meeting, Continental presented the FAL pilot negotiators with the first draft of the JPA, with the LPA attached to the back. (*See* Defendants' Exhibit N at ¶¶ 3-4; Defendants' Exhibit NN at 11842, 12265-66). The FAL pilots reviewed the LPA at that time. (*See* Defendants' Exhibit NN at 12266).

On the morning of September 16, 1986, the FAL pilot negotiators met with Mr. Abram and discussed the LPA, including the statements allegedly made by Continental about the LPA the evening before. (*See* Defendants' Exhibit NN at 118842-43; Exhibit OO at 3). Frontier Captain Robert L. Williams referred to the "LPA statements" as a "major area of concern" at the meeting with Mr. Abram. (*See* Defendants' Exhibit OO at p.3).

Pursuant to this court's request on July 27, 1992, the FAL pilots have filed the transcript of Mr. Abram's deposition, taken in connection with a legal malpractice action filed against Mr. Abram by the Frontier pilots in the Supreme Court of the State of New York, County of New York. In his deposition, Mr. Abram disputes the testimony of his former clients, asserting that he was unaware of the LPA until several months later. This testimony cannot help the FAL pilots avoid summary judgment in this case for two reasons. First, as the FAL pilots' counsel, Mr. Roberts, conceded at the July 27, 1992 hearing, it is the testimony of the FAL pilots that is relevant, and not Mr. Abram's testimony. (*See* transcript of oral argument conducted on July 27, 1992 at pp. 20-21). As illustrated above, the FAL pilots did see the LPA at the September 15th meeting and admit that Mr. Abram was in the same room. They could have spoken to Mr. Abram about it at that meeting, and, in fact, Frontier Captain Williams has testified that they spoke to Mr. Abram about the LPA the next day. The FAL pilots cannot create "a genuine issues of material fact" by advancing the adverse testimony of their former lawyer, whom they are currently suing. Second, and perhaps more important, assuming arguendo that Mr. Abram was unaware of the LPA until several months after the September 15, 1986 meeting, he was surely aware of the relevant facts concerning the LPA when his clients filed a petition to vacate the Nicolau Award in the District Court in Colorado on September 4, 1987, nearly one year later.

Moreover, the court notes that, on March 29, 1987, on the second day of the Nicolau arbitration, the FAL pilots placed into evidence the excerpt from the DOT filing which contained Texas Air's comments regarding labor protection provisions ("LPPs"). (*See* Defendants' Exhibit KK). Mr. Lieber was the counsel for the FAL pilots who put the exhibit into evidence; Captain Williams was the sponsoring witness. (*See* Defendants' Exhibit LL; Exhibit MM at 249-52). These factors demonstrate that the FAL pilots could have made their fraud argument to the Colorado state courts.

At the July 27, 1992 hearing, Mr. Roberts, the FAL pilot's counsel, argued that they could not have advanced their fraudulent inducement argument in the Colorado state courts because it is not one of the grounds for challenging an arbitration award pursuant to the Colorado Uniform Arbitration Act, Colo. Rev. Stat. §§ 13.22 *et seq.* (*See* transcript of hearing of p.17).[11] In support of their argument, the FAL pilots have cited two Sections 13-22-214 and 11-22-215 and have suggested that those are the "only grounds for challenging an arbitration award. . . ." (*See* plaintiff's opposition to defendants' motion for summary judgment at p. 53). Counsel for plaintiff has either failed to conduct thorough research or has been less than candid with this court. In this regard, § 13-22-203 of the Colorado Uniform Arbitration Act, which the FAL pilots failed to cite, provides an exception to the general enforceability of arbitration clauses "upon such grounds as exist at law or in equity for the revocation of any contract." Accordingly, contrary to plaintiff's assertions, a party may oppose confirmation of an arbitration award if that party claims that the *arbitration clause* was fraudulently induced. *See National Camera, Inc. v. Love*, 744 P.2d 94 (Colo. App. 1982).

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[11] Mr. Lieber advanced the same argument in his declaration submitted along with plaintiff's supplemental brief in opposition to defendant's motion for summary judgment. (*See* Lieber declaration at ¶ 5, 10).

The uncontroverted facts set forth above clearly establish that the FAL pilots knew the contents of the LPA; their lawyers had seen the DOT filings; their lawyers discussed both the LPA and the DOT filings with them; and they, thereafter, relied upon their lawyer to sign the JPA. In the final analysis, the undisputed facts establish that the FAL pilots had, contemporaneously with the PEX pilots, sufficient knowledge about the facts to raise their fraudulent inducement claim in the Colorado state courts. The FAL pilots filled their petition to vacate the Nicolau Award in the Colorado trial-level court on September 4, 1987. Instead of advancing their LPA argument at that time, they choose to wait until they filed their petition for *certiorari* with the Colorado Supreme Court. Having chosen that course, they have arrived at their final destination. For reasons set forth above, PLAINTIFF'S CLAIM OF FRAUDULENT MISREPRESENTATION IS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Moreover, I find that plaintiff's claim of misrepresentation is barred by the doctrine of collateral estoppel. The related doctrine of collateral estoppel refers to issue preclusion. The doctrine holds that the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit. Collateral estoppel applies to a cause of action different from that involved in the original controversy but does not apply to matters which could have been litigated but were not. *Pomeroy v. Waitkus*, 517 P.2d 396, 399 (Colo. 1973). Collateral estoppel is broader than *res judicata* in that it applies to a cause of action different from that involved in the original controversy. *Id.* In determining whether the doctrine of collateral estoppel may be invoked, a court must consider the following four (4) factors:

> (1) was the issue decided in the prior adjudication identical with the one presented in the action in question?

(2) was there a final judgment on the merits?

(3) was the party against whom the plea is asserted a party or in privity with party to the prior adjudication?

(4) did the party against whom the doctrine asserted have a full and fair opportunity to litigate the issue in the prior adjudication?

In applying the doctrine of collateral estoppel to this case, the court notes that, on March 31, 1989, the FAL Committee petitioned the Denver Bankruptcy Court to vacate the JPA on the ground that the LPA gave them superior rights and that the JPA had been fraudulently induced. (*See* App. 411 at ¶ 1; defendants' Exhibit Q at 5-7, 17-32). The Bankruptcy Court denied that motion on April 7, 1989, *see* App. 415-22, and the District Court dismissed the FAL Committee's appeal on August 8, 1990. *Former Frontier Pilot Litigation Steering Comm. v. Frontier Airlines, Inc.*, 177 B.R. 588 (D.Colo. 1990). In addition, as previously noted, the FAL pilots argued both before Arbitrator Nicolau and the Colorado trial court that the Nicolau Award was invalid because the FAL pilots were fraudulently induced into signing the JPA while the legal import of the LPA was misrepresented to them. Applying the elements of collateral estoppel to this case, first, it is evident that the issue decided in the Colorado Bankruptcy Court and in the Nicolau Arbitration is identical with the issue presented in this case.[12] Second, there was a final judgment on the merits in the Colorado Supreme Court on the direct appeal from the Nicolau Award and in the Colorado District Court on the appeal from the Denver Bankruptcy Court to vacate the JPA. Third, the FAL pilots, the part against whom defendants seek to assert the doctrine of collateral estoppel, were a party to the prior adjudications in the Colorado state courts. Fourth, and finally, the FAL pilots had a

[12] The issue is, of course, whether the FAL pilots were fraudulently induced into signing the JPA based on the misrepresentations by Continental.

full and fair opportunity to litigate the fraudulent inducement issue in the prior adjudication in Colorado. Accordingly, PLAINTIFF'S CLAIM OF FRAUDULENT MISREPRESENTATION IS ALSO BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

The court further notes that at oral argument on July 27, 1992, counsel for plaintiff relied heavily on a decision of the Colorado Court of Appeals in *Altergott v. Yeager*, 543 P.2d 1293 (Colo. App. 1975), *cert. denied*, 116 Colo. 379 (1976). In *Altergott*, plaintiff Ruby Altergott filed an amended compliant against the defendants, Harold Yeager and his brothers Albert and Victor, claiming damages as a result of fraudulent representations made to her by the defendants.[13] The prolonged and tortured history of events leading up the *Altergott* action began when Harold Yeager was adjudged to be the father of a child born to Ruby Altergott on September 27, 1943. Altergott instituted a paternity action on December 31, 1943, which ultimately resulted in a jury verdict and judgment for plaintiff entered on January 6, 1948. That judgment awarded plaintiff damages of $47.50 per month and directed back payments due from the date of the birth of the child to be paid in a lump sum at once. The monthly payment of $47.50 was to be continued for a period not to exceed 18 years from the birth of the child.

On the day after the birth of the child, Harold, by quit claim deeds, conveyed all his right, title and interest in two parcels of land, which he then owned in the County of Boulder, to his brother Albert and his now deceased brother Herman. On December 10, 1946, Albert and Herman, in response to garnishee summons and interrogatories served upon them, filed their answers under oath asserting "that they did not have in their possession or under their control any property of Harold Yeager

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[13] Albert and Victor Yeager were sued as co-executors of the Estate of Herman Yeager, Dec'd; additionally, Albert and Harold were sued individually.

or in which he is interested." *Altergott*, 543 P.2d at 1295. They further asserted to their answers "that they did not know of any property, real or personal, in which Harold Yeager had an interest, and the title to such property was not recorded in his name." *Id.* In her complaint, Altergott contended that "such statements were false, were known to be false when made, and were made with an intent that [plaintiff] rely upon them to her damage." *Id.*

After the jury verdict was returned in the paternity action, in August 1948, Altergott filed a complaint against Harold, Albert and Herman, claiming that the real property previously conveyed by Harold to Herman and Albert was conveyed for the purpose of avoiding legal liability to support Harold's son. Harold answered this complaint and stated that "he had no property subject to levy under execution, and that he had no property subject to levy under execution, and that he had no right, title or interest in or to the real estate described in the complaint and disclaimed any interest therein." *Id.* at 1295. Altergott claimed that this statement was false, was known by Harold to be false, and was made for the purpose that she rely upon it. In her amended complaint, Altergott also claimed that on November 10, 1948, Herman and Albert Yeager filed their verified answer to garnishee summons, and claimed that "they did not have in their possession or under their control any property of Harold . . . or any property in which [he] was interested," and that these statements were knowingly false and made for the purpose of defrauding plaintiff. *Id.*

On December 8, 1948, Harold offered to settle and satisfy the judgment rendered in the paternity action for the sum of $5,000 which was to be a "complete settlement of all obligations for support, maintenance and education of the child and the plaintiff personally." Altergott relied upon the previously made false statements of Albert, Herman and Harold Yeager, and entered into stipulation and agreement of settlement which

approved by the court on December 8, 1948. As part of the settlement agreement, the court dismissed the money judgment rendered in the paternity suit and also dismissed with prejudice the suit instituted by plaintiff Ruby Altergott in August 1948.

On August 4, 1965, Herman died and Harold Yeager filed a claim against Herman's estate asserting that Harold was the equitable owner, pursuant to *an oral trust agreement* with Herman, of 28.98% of all property held in Herman's name. Following a hearing, the court with jurisdiction over the estate held on April 2, 1971, that an oral agreement was made in 1946 between Herman, Albert, and Harold where by, upon completion of a program of work to which they all agreed, Harold's respective interest in the overall joint farming operations would be 20%; that legal title to the interest of Harold Yeager was at all times held in the name of Herman Yeager; and that Harold's 20% interest in the entire farming operation of the brothers constituted 28.98% of interest in the property held in the name of Herman Yeager with certain irrelevant exceptions.

During the course of hearings on the claim, Altergott was subpoenaed in March 1972 to testify as a witness, and *it was at that time* that Altergott allegedly first learned of the oral agreement between the defendants and Harold concerning Harold's ownership interest in real property. *Altergott*, 543 P.2d at 1296 (emphasis supplied). It was as a result of that knowledge that Altergott filed her complaint in the Colorado trial court on June 2, 1972.

Defendants moved for summary judgment based upon the ground that Altergott's 1972 action constituted a collateral attack on the judgment of dismissal in the paternity action and the dismissal of the law suit filed by Altergott in 1948.

The trial court granted summary judgment and found, as a fact, that the fraud Altergott complained of in 1972 was intrinsic to the action instituted by her in August 1948, and was clearly presented to the court in that action. *Id.* at 1296. On appeal, the

Colorado Court of Appeals held that plaintiff was not collaterally attacking a prior judgment which had been dismissed with prejudice as part of a settlement, since plaintiff accepted the judgement of dismissal as valid in proceeding on the theory of an affirmance of the settlement contract fraudulently procured. The Court of Appeals further held that the issue of fraudulent misrepresentation was not involved in the prior action, nor litigated therein. *Id.* at 1296-97.

The Court of Appeals further noted that, in the prior action in 1948, Altergott sought to set aside the quit claim deeds of 1943 executed by Harold to his brothers as a fraud upon Harold's creditors. While the fraud alleged by Altergott in 1948 was the *conveyance* by Harold for the purpose of avoiding liability to support his son, the Colorado Court of Appeals emphasized that the fraud alleged in Altergott's 1972 case was the secret oral agreement made in 1946 and the false representations made by defendants in 1946 which induced her to settle her claim for child support. *Id.*. (Emphasis in original). The Court of Appeals found that the fraud alleged by Altergott in 1972 was extrinsic to the prior actions, and not intrinsic as the trial court found. *Id.* at 1927.

The Frontier pilots' reliance on *Altergott* is misplaced because this case is clearly distinguishable from the facts in *Altergott.* In this case, there is one alleged fraudulent misrepresentation which occurred during the negotiations of the JPA in 1986. Moreover, in this case, plaintiff's claim of fraudulent misrepresentation arises from one event or transaction, namely the negotiation and execution of the JPA agreement as a condition to the merger between Texas Air and People Express. While Ruby Altergott was unaware, and could not have known about the 1946 oral trust agreement until a court ruling in 1971, Frontier pilots, plaintiff in this case, were parties to the JPA negotiations and, as such, were fully aware of all the facts which comprised their alleged fraudulent misrepresenta-

tion claim in 1986. Moreover, alleged fraud which Frontier advances in this case is intrinsic to the prior actions in the Colorado state courts, and not extrinsic, like the fraud alleged by Altergott. I also emphasize that, unlike Ruby Altergott, the plaintiff in this action was represented during the JPA negotiations by experienced and extremely competent legal counsel who were well trained and battle-tested in the field of labor negotiations. Accordingly, PLAINTIFF'S RELIANCE ON *ALTERGOTT* IS MISPLACED AND CANNOT PREVENT THE DISMISSAL OF THEIR MISREPRESENTATION CLAIM.

Assuming arguendo, that the FAL pilots' misrepresentation claim was not barred by the doctrine of *res judicata* and collateral estoppel, I find that the claim also fails on the merits. As previously stated Colorado law governs this case. In tort cases, New Jersey courts utilize a flexible governmental interest analysis in determining which state's law to apply. *System Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1137 (3d Cir. 1977). In this case, Colorado has the most significant interests. In this regard, Colorado is where the JPA was negotiated, where the Nicolau Award had its greatest impact and where the Award has already been challenged. New Jersey, on the other hand, had not relationship or connection to the negotiation of the JPA or the Nicolau arbitration.

In their Complaint, the Frontier pilots allege that defendants misrepresented the legal significance of the LPA during the negotiations of the JPA. (*See* Plaintiff's original Complaint at ¶ 16). This claim must fail for two reasons;:

First, by plaintiff's own admission, defendants did not allegedly misrepresent *any fact*. On the contrary, defendants' statements represent an expression of an opinion as to the legal validity and the significance of the LPA.

Second, assuming arguendo, that defendants' statements could somehow be construed as statements of fact, plaintiffs had

no reasonable right to rely on such statements as a matter of law. In this regard, Colorado has long held that:

> A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such.

Metzger v. Baker, 24 P.2d 748, 749 (Colo. 1933) (*quoting Fish v. Cleland*, 31 Ill. 238, 243 (1930). *See also, Two, Inc. v. Gilmore*, 679 P.2d 116 (Colo. App. 1984). Statements concerning the "legal effect of a course of a conduct or a document are not actionable." 1 Colorado Law Annot. 489, 490.

An alleged misrepresentation concerning the validity of a document fails if the party to whom the statement was made has an opportunity to inspect the document and determine its legal effect for himself. *See Peden v. Birkle*, 148 P.913 (Colo. App. 915); 1 Colorado Law Annot. 489, 493. *See also Amoco Oil co. v. Ashcraft*, 791 F.2d 519 (7th Cir. 1986) (Misrepresentation about the meaning of a document is not actionable because a party can protect itself by reading the document). In this case, the FAL pilots have conceded, the record reflects, that they had the opportunity to inspect the LPA, and that it was available to their lawyer. Moreover, they had an ample opportunity to determine the legal effect of the LPA for themselves. Accordingly, the FLA pilot's claim of fraudulent misrepresentation must fall on the merits as well.

THE FAL PILOT'S CLAIM FOR BREACH OF CONTRACT OR THIRD-PARTY BENEFICIARY CONTRACT (COUNT 2)

In Count 2 of their Complaint, plaintiff advances a claim for breach of contract. The gravemen of the FAL pilots' breach of contract claim is that this court supposedly found them to be third-party beneficiaries of the LPA in the *PEX* litigation. To the contrary, I declined to hold that the FAL pilots were third-party beneficiaries of the LPA; and I allowed them to participate in the Ross Arbitration under the LPA only to protect the position that they already attained by virtue of the Nicolau Arbitration conducted pursuant to the JPA. In addition, and claim for breach of contract is similarly barred by the doctrines of *res judicata* and collateral estoppel. With respect to the doctrine of *res judicata*, plaintiff has both directly and indirectly advanced this claim in the Nicolau Arbitration proceedings and in the appeal of that Award in the Colorado state courts. Assuming arguendo, that plaintiff did not actually raise the breach of contract claim in the Colorado state courts, I nonetheless find that they could have been and should have been raised since all the relevant facts were known to the plaintiff at that time. Accordingly, plaintiff's BREACH OF CONTRACT CLAIM IS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

With respect to the doctrine of collateral estoppel, a careful review of the record in the *FAL* litigation reveals that, on numerous occasions, the FAL pilots raised and actually litigated the very issues which form the core of their breach of contract claim. Specifically, the record is replete with arguments made by the FAL pilots to Arbitrator Nicolau and the Colorado state courts that they were third-party beneficiaries of the LPA, and, as such, should have been integrated into the Pilot Seniority List under the terms of the LPA agreement. These issues were raised and rejected by Arbitrator Nicolau and the Colorado state courts

and, as such, must be rejected here under the doctrine of collateral estoppel.

Assuming arguendo, the LPA could be construed to apply to FAL pilots, the breach of contract claim must fail because no breach occurred. The FAL pilots freely entered into the JPA agreement to obtain offers of employment or severance pay. Nothing in the LPA prevented the former FAL pilots and Continental from reaching that specific agreement; the LPA clearly contemplated a document like the JPA in order to give effect and life to its statement that "provision shall be made for fair and equitable seniority integration procedures." ACCORDINGLY, PLAINTIFF'S CLAIM OF BREACH OF CONTRACT IS HEREBY DISMISSED WITH PREJUDICE.

The court now addressed plaintiff's appeal of Magistrate Judge Hedge's order, dated march 6, 1992, denying plaintiff's request for limited discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. I find that Magistrate Judge Hedge's Order is neither clearly erroneous nor contrary to law. *See Cipollone v. Ligget Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986). Moreover, based upon my *de novo* review of the record, I find that plaintiff's request for discovery is meritless and that no additional facts could be discovered which would prevent the application of the doctrines of *res judicata* and collateral estoppel to plaintiffs' claims in this action.[14] The court further notes that the FAL pilots' request to take depositions is in direct contradiction to their representations before Judge Balick of the Bankruptcy Court presiding over Continental's Chapter 11 Reorganization. Specifically, on October 2, 1991, Judge Balick heard argument from the FAL pilots concerning the conditions for permitting this case to go forward. Mr. Roberts, the FAL pilots' current counsel, stated that the FAL pilots did not need

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[14] I also note that plaintiffs have conducted extensive discovery and are quite familiar with all the facts by virtue of their participation in the *FAL* litigation, and this litigation.

any depositions and would not seek any if the automatic stay were lifted.[15] Regardless of the fact that Mr. Roberts has taken a new position concerning depositions, it is evident that no amount of discovery could save plaintiffs' claims at this juncture. ACCORDINGLY, THE FAL PILOTS' APPEAL OF MAGISTRATE JUDGE HEDGES' ORDER, DATES MARCH 6, 1992, IS HEREBY DENIED.[16]

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[15] The colloquy between Judge Balik and Mr. Roberts was as follows:

Q. And am I right that your saying that you would take no depositions in connection with your case?

A. . . . [T]hey're not necessary to put the case on.

Q. You're not going to seek to take depositions, if the stay is lifted?

A. We have no plans at this time to take any depositions.

(*See* transcript of hearings conducted on October 2, 1991 at p. 91).

[16] At the conclusion of oral argument on July 27, 1992, I permitted both parties to file supplemental papers with respect to defendant's motion for summary judgment. Plaintiff took this opportunity to make another request, albeit an informal one, for leave to take limited depositions. Not only was this application improperly filed under the Federal Rules of Civil Procedure, but it is totally without merit. Plaintiffs already have the deposition of their former counsel, Mr. Abram, in connection with their legal malpractice action against him. Moreover, this informal request to take limited depositions is nothing more than another 11th hour attempt to avoid the inevitable, namely, the entry of summary judgment in favor of defendants and against the FAL pilots.

CONCLUSION

Based on the reasons set forth above, defendants' motion for summary judgment is hereby GRANTED and plaintiff's entire Complaint is hereby DISMISSED WITH PREJUDICE. Plaintiff's cross-motion to amend is DENIED. In addition, plaintiff's appeal of Magistrate Judge Hedges' Order, dated march 6, 1992, is HEREBY DENIED. THIS CONCLUDES THE ENTIRE CASE AND THE CLERK OF THE COURT IS HEREBY DIRECTED TO CLOSE THE FILE IN THIS MATTER.

SO ORDERED:

/s/_____
NICHOLAS H. POLITAN
U.S.D.J.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5592

FRONTIER PILOTS LITIGATION
STEERING COMMITTEE,

Appellant,

v.

TEXAS AIR CORPORATION;
CONTINENTAL AIRLINES, INC.;
PEOPLE EXPRESS, INC.,
JOHN ADAMS and JOHN DOES 1 through 10

On Appeal from the United States District Court
for the District of New Jersey (D.C. Civil No. 89-3879)
District Judge: Honorable Nicholas H. Politan

Argued June 7, 1993
(Filed June 10, 1993)

BEFORE: GREENBERG, NYGAARD, and, LEWIS, *Circuit Judges*

JUDGEMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

/s/_____
Greenberg, Circuit Judge

ATTEST:

/s/_____
P. Douglas Sisk
P. Douglas Sisk, Clerk

C1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5592

FRONTIER PILOTS LITIGATION
STEERING COMMITTEE,

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v.

TEXAS AIR CORPORATION;
CONTINENTAL AIRLINES, INC.;
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JOHN ADAMS AND JOHN DOES 1 through 10

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil No. 89-3879

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, and, LEWIS, *Circuit Judges*

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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BY THE COURT:

/s/_____
Greenberg, Circuit Judge

DATED: JULY 8, 1993